

OFFICIAL TRANSCRIPT OF PROCEEDINGS BEFORE THE POSTAL RATE COMMISSION

In the Matter of:)

EXPERIMENTAL PERIODICALS)
CO-PALLETIZATION DROPSHIP)
DISCOUNTS FOR HIGH EDITORIAL)
PUBLICATIONS 2004)

Docket No. MC2004-1

VOLUME #1

POSTAL RATE COMMISSION
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POSTAL RATE COMMISSION

In the Matter of:)
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EXPERIMENTAL PERIODICALS) Docket No. MC2004-1
CO-PALLETIZATION DROPSHIP)
DISCOUNTS FOR HIGH EDITORIAL)
PUBLICATIONS 2004)

Room 300
Postal Rate Commission
1333 H Street, N.W.
Washington, D.C.

Volume 1
Thursday, March 25, 2004

The above-entitled matter came on for hearing pursuant to notice, at 10:04 a.m.

BEFORE :

HON. GEORGE A. OMAS, CHAIRMAN
HON. DANA B. COVINGTON, VICE-CHAIRMAN
HON. RUTH Y. GOLDWAY, COMMISSIONER
HON. TONY HAMMOND, COMMISSIONER

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P R O C E E D I N G S

(10:04 a.m.)

CHAIRMAN OMAS: This is a prehearing conference in Docket No. MC2004-1, considering the request of the Postal Service for an experimental discount applicable to certain periodicals mail that is co-palletized and dropshipped. Commission Order No. 1392 gave notice of the Postal Service request and granted a request for the expedition to the extent of allowing a shorter-than-usual intervention period, allowing settlement discussions, and requiring participants' interest in a hearing to be identified in the notice of intervention.

There are two outstanding procedural motions related to the intervention process. The first is a request for late acceptance of the notice of intervention submitted by the Association of American Publishers on March 18, 2004. That motion is granted.

The second is a request for late intervention submitted by the Alliance of Nonprofit Mailers on March 24, 2004. That motion is granted.

Before proceeding further, I would like to ask counsel to identify themselves for the record.

The Alliance of Nonprofit Mailers?

MS. LEONG: I'm Joy Leong with Sidley,

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1 Austin, Brown & Wood, representing the Alliance of
2 Nonprofit Mailers.

3 CHAIRMAN OMAS: Good morning, Joy.

4 MS. LEONG: Thank you.

5 CHAIRMAN OMAS: American Business Media?

6 MR. STRAUS: Good morning. I'm David Straus
7 with Thompson & Coburn, LLP, representing American
8 Business Media.

9 CHAIRMAN OMAS: Good morning.

10 American Postal Workers Union, AFL-CIO?

11 (No response.)

12 CHAIRMAN OMAS: Association of American
13 Publishers?

14 (No response.)

15 CHAIRMAN OMAS: Magazine Publishers of
16 America?

17 MS. DALY: Good morning. I'm Cecilia Daly,
18 representing the Magazine Publishers of America, along
19 with Pierce Meyer.

20 CHAIRMAN OMAS: Thank you.

21 Office of the Consumer Advocate?

22 MR. COSTICH: Good morning, Mr. Chairman.
23 I'm Rand Costich, representing the OCA. With me is
24 Shelly Dreifuss, director of the office.

25 CHAIRMAN OMAS: Thank you.

1 David E. Popkin?

2 (No response.)

3 CHAIRMAN OMAS: Time Warner, Inc.?

4 MR. KEEGAN: Good morning. My name is
5 Timothy Keegan. I'll be representing Time Warner,
6 along with my partner, John M. Burzio.

7 CHAIRMAN OMAS: Is there anyone else?

8 MS. RUSH: Good morning, Mr. Chairman.
9 Tonda Rush with the National Newspaper Association.
10 We have this morning filed a motion for leave to
11 intervene at a time in this case.

12 CHAIRMAN OMAS: All right. Thank you.

13 And would the Postal Service please identify
14 themselves?

15 MR. RUBIN: I am David Rubin for the Postal
16 Service, and with me is Ken Hollies.

17 CHAIRMAN OMAS: Thank you.

18 The Postal Service seeks expeditious
19 treatment of this request for experimental authority.
20 Consistent with the request, the Postal Service
21 counsel was appointed settlement coordinator and
22 authorized to schedule meetings to attempt to reach a
23 negotiated agreement. A settlement conference was
24 scheduled for Monday, March 22. Mr. Rubin, would you
25 please report on the progress made toward that

1 settlement in this case?

2 MR. RUBIN: Yes. Thank you. A settlement
3 conference was held on Monday, March 22nd. While no
4 one opposed the Postal Service's proposal, two parties
5 said they wished to conduct discovery before they
6 decided about the need for a formal hearing.

7 Participants have raised several issues for
8 discovery and filed some interrogatories, and the
9 Postal Service is responding to discovery on these
10 issues.

11 CHAIRMAN OMAS: Thank you, Mr. Rubin.

12 Does any participant wish to add something
13 to Mr. Rubin's statement or to anyone else? Mr.
14 Straus?

15 MR. STRAUS: I am certainly not accusing Mr.
16 Rubin of misrepresenting American Business Media's
17 position, but I didn't want the statement that nobody
18 opposes the proposal to go unanswered. American
19 Business Media's position is that it does oppose the
20 proposal, absent some showing by the Postal Service
21 that there is good reason to deviate from the flat
22 editorial pound rate, and we do not believe that it
23 has yet shown such a reason. We are willing to engage
24 in discovery and settlement to see if more facts
25 brought on the record might show some support, but at

1 the moment, it would be slightly off center to say
2 that we do not oppose the proposal because, at this
3 point, we do.

4 CHAIRMAN OMAS: Thank you, Mr. Straus.

5 The Postal Service submitted with its filing
6 several more substantive motions that will directly
7 affect the procedural course of this case. I will now
8 turn to those motions.

9 First, the Postal Service asked that its
10 request be considered pursuant to Rule 67 and the
11 rules applicable to requests involving experimental
12 changes. When the Commission agreed to utilize these
13 rules, it undertakes to establish a schedule that will
14 allow for a decision in no more than 150 days. No
15 participant directly opposed using the rules
16 applicable to experimental classification changes.
17 However, the American Business Media sought to delay
18 the start of the 150-day period until after the close
19 of an extensive discovery period. Time Warner also
20 requested a fairly lengthy period for discovery.

21 I would like counsel for the American
22 Business Media and Time Warner to briefly describe the
23 issues they intend to probe by discovery and to
24 explain why they believe this process will take
25 months.

1 Mr. Straus, would you please respond first?

2 MR. STRAUS: In general, as I stated before,
3 the overriding issue is whether, in fact, there is any
4 benefit to anyone from the proposal in this
5 proceeding. We view the proposal as being so limited,
6 the discount as being so small, the universe of
7 publications that are even, in theory, eligible for
8 the discount so small, and the experience under the
9 existing co-palletization experiment so educational
10 that it appears more that this proposal is a way to
11 have something on record as being, in theory,
12 available to certain small publications rather than a
13 serious proposal to encourage a significant amount of
14 co-palletization among high-editorial publications.

15 The discovery is attempting to probe the
16 Postal Service's information, if it has any, on the
17 extent to which this discount would actually be used.
18 It shouldn't take an extensive period of time for
19 discovery, but our experience in these cases shows
20 that answers to interrogatories and requests for
21 production often produce limited, although perhaps
22 literally responsive documents or answers, and that a
23 second and third round of requests is necessary.

24 We are certainly willing to do our part to
25 expedite, and we certainly would not object if the

1 Commission established a procedural schedule with not
2 much more than 150 days in it, with the understanding
3 that if the parties get bogged down, through no fault
4 of the intervenors, in discovery, that the Commission
5 is always free, as I understand it, to extend the 150
6 days. It's not the same as the statutory deadline for
7 rate cases, and if you believe that 150 days is a
8 suitable goal but are willing to take a realistic look
9 at that goal as we move forward in this proceeding, if
10 we do, then there won't be any objection from us.

11 There is a lot of information that one would
12 think would have been filed with this proceeding that
13 wasn't filed in support of the case. Let me give you
14 an example. The Postal Service relies on the amount
15 of co-palletization and dropshipping that's been done
16 under the existing co-pallet discount, and the data it
17 provided to support that ends with the end of Fiscal
18 Year 2003. Well, we have asked for an update of that
19 information. The Postal Service argues, in its direct
20 case, that there is an upward trend, and it would be
21 nice to see how that trend extends beyond October
22 2003. We're already into March of 2004.

23 Also, there seems to be a combination in
24 those data of periodicals that were co-palletized
25 before the experiment began and those that were co-

1 palletized as a result of the experiment, and if one
2 wanted to see what the incentive is for co-
3 palletization, one would have to take out of the total
4 those who were co-palletizing before the experiment
5 even began.

6 We asked a series of questions in
7 interrogatories, as did Time Warner, and Mr. Keegan
8 can speak for himself on why he believes some delay in
9 the start of the 150 days is appropriate.

10 CHAIRMAN OMAS: Thank you, Mr. Straus.

11 Mr. Burzio.

12 MR. KEEGAN: Timothy Keegan for Time Warner,
13 Mr. Chairman. We agree with Mr. Straus insofar as we
14 believe that the testimony submitted by the Postal
15 Service does not indicate with any clarity why the
16 Postal Service believes that there will be any
17 substantial use of this particular discount.

18 Secondly, the testimony submitted by the
19 Postal Service contains several statements to the
20 effect that the periodicals subclass as a whole will
21 substantially benefit from this proposal, and for the
22 same reasons that we are not at all clear on why there
23 would be substantial use of the discount, we are in
24 doubt as to what evidence exists to believe that there
25 will be a substantial discount to other mailers in the

1 subclass as a result of this discount.

2 And, finally, Mr. Chairman, we have
3 considerable doubts about the fairness and equity of
4 the particular qualification criteria for the
5 discount, which are very narrowly drawn, and it is not
6 apparent from the testimony of the Postal Service on
7 what basis they have concluded that it is fair to
8 provide this discount to mail that meets those
9 particular restrictive qualifications but not
10 similarly situated mail that falls outside those
11 qualifications.

12 Finally, let me say that, like Mr. Straus, I
13 would say that we are prepared to cooperate with an
14 expedited schedule, and we would like a fair
15 opportunity for discovery and for at least a couple of
16 rounds of discovery. But beyond that, we are
17 certainly willing to do whatever we can to cooperate
18 and expedite in this case.

19 CHAIRMAN OMAS: Thank you.

20 MR. STRAUS: Mr. Omas?

21 CHAIRMAN OMAS: Yes, Mr. Straus.

22 MR. STRAUS: This is case that, if it goes
23 to evidentiary hearing, will represent a failure by
24 the parties to realistically appraise this proposal.
25 There is not enough at stake in this case, in terms of

1 what's actually being proposed, to justify the very
2 significant expense to the parties of having to
3 undergo an evidentiary hearing, which would be really
4 designed to address a principle that isn't even
5 directly raised in this case; that is, the flat
6 editorial rate.

7 It may come as a surprise that Time Warner
8 and ABM both oppose this proposal, but we do it from
9 very different perspective. Time Warner, as you know,
10 is a strong supporter of zoning, and ABM is an
11 opponent of zoning, yet we each find fault with this
12 proposal.

13 One reason that we suggested in our pleading
14 a significant delay before the hearing process begins
15 is the cost of that hearing process. We certainly
16 would like to see that all efforts to exchange data
17 and to resolve this case short of hearing can be
18 accomplished before the significant expense of a
19 hearing is incurred. We all expect that we need to be
20 saving our pennies for the real one that's coming down
21 the pike, and I would hate to exhaust the resources of
22 American Business Media or of anybody else on a
23 hearing if it really isn't necessary.

24 I'm jumping way ahead of us, of course, but
25 I think one possibility in this case, given the fact

1 that there appears to be no support for the proposal,
2 at least among anyone who claims that they will
3 actually use the experimental rate, there is a
4 significant opposition to the proposal. I think the
5 Postal Service needs time to consider whether it
6 should withdraw the proposal, and knowing how quickly
7 they make decisions at L'Enfant Plaza, that kind of
8 decision, I'm sure, can't be made in 30 days. But I
9 think that's one outcome of this case that ought to be
10 seriously considered.

11 CHAIRMAN OMAS: Thank you.

12 MR. KEEGAN: Mr. Chairman, if I may just
13 correct one statement by Mr. Straus. Time Warner does
14 not oppose this proposal. It has not yet determined
15 what position it will take, and it will determine that
16 position based on the results of the responses to our
17 discovery requests.

18 CHAIRMAN OMAS: Thank you. Thank you both
19 for your comments.

20 Under our rules of practice, 14 days are
21 allowed for responding to discovery requests. In a
22 number of recent cases, the Postal Service has agreed
23 to provide responses in several days. In order to
24 facilitate an expedited schedule, Mr. Rubin, is the
25 Postal Service prepared to undertake to respond to

1 discovery within seven days?

2 MR. RUBIN: What we were ready to offer was
3 a 10-day turnaround. We received 43 multipart
4 interrogatories yesterday from two parties that have
5 just spoken, and I think it's going to take that much
6 time to get the responses complete for that. So if it
7 goes on, I think a week is going to be difficult for
8 the Postal Service.

9 CHAIRMAN OMAS: Well, under those
10 circumstances, I guess we'll have to accept 10 days.

11 MR. RUBIN: We are going to try to turn them
12 around faster. We did respond to the OCA's
13 interrogatories in less than seven days, I believe.

14 CHAIRMAN OMAS: All right. The Postal
15 Service did ask for expedited proceedings.

16 Does any other participant wish to comment
17 on the need for discovery? Mr. Rubin?

18 MR. RUBIN: The Postal Service would like to
19 respond to ABM and Time Warner and note --

20 CHAIRMAN OMAS: Would you pull the mike
21 closer? We can't hear you.

22 MR. RUBIN: The 150 days for experiment has
23 always included some time for discovery, and we think
24 that it can be fit in without delaying the recommended
25 decision, especially for a case like this one, which

1 is relatively simple. It has one piece of testimony
2 and one exhibit. We recall that in the heavily
3 litigated, mailing-on-line experiment, MC2000-2, there
4 were five pieces of testimony and a much more
5 complicated proposal. Nonetheless, discovery was
6 limited to six weeks and a day in order to provide
7 time for the recommendation within five months.

8 We believe that six weeks plus a day from
9 the filing of the request is an appropriate time for
10 discovery in this docket, and that would allow two
11 weeks from today for additional discovery on our
12 proposal. The parties want more than one cycle of
13 discovery, and that is consistent with a six-week
14 discovery period, with the Postal Service responding
15 within 10 days or less, when possible, and appropriate
16 follow-up discovery.

17 We don't see much risk that a conscientious
18 participant would find a new issue that is relevant to
19 the proposed experiment and that could not be raised
20 during the six weeks of discovery.

21 The Postal Service wants a recommended
22 decision in five months, if not sooner, in order to
23 supplement the current co-palletization experiment
24 with the proposed discounts as soon as possible. We
25 found that there is a gap in the current experiment.

1 We want to build these additional discounts into the
2 experiment, and we think that will help both with the
3 new experimental discounts and also even bringing some
4 additional volume into the current experiment.

5 We have heard that printers, in some cases,
6 want to switch entirely from sacks to pallets to make
7 co-palletization worthwhile. If they have a
8 substantial amount of high-editorial publications,
9 they may have decided not to do any co-palletization,
10 but with these new discounts, they may be able to
11 switch entirely to pallets.

12 And we also know of publishers, contrary to
13 ABM's suggestion, that are eager to use the proposed
14 discounts for high-editorial publications.

15 And, finally, we want to start getting
16 experimental data from these proposals as soon as
17 possible so that the possibility of building that data
18 into a future case is maximized.

19 The Postal Service is quite concerned that
20 action on this small proposal to enhance the co-
21 palletization experiment will be delayed by parties
22 seeking advantage on broader issues that should be
23 litigated in other dockets. In particular, we urge
24 the Commission to keep the issues raised by the
25 Periodicals Complaint case, Docket No. C2004-1, from

1 unduly complicating this experimental docket. Thank
2 you.

3 CHAIRMAN OMAS: Thank you, Mr. Rubin.

4 The Commission is committed to expediting
5 these cases to the extent feasible. However, in my
6 view, the Postal Service has not shown that there is
7 any justification for extraordinary speed in this
8 case.

9 Discovery will be allowed through May 24,
10 2004, which is, I believe, 60 days from today. That
11 should be plenty of time to explore the limited
12 factual issues raised in this case. No participant
13 has requested a hearing at this time. However, I do
14 not want this case to be delayed by a late decision to
15 schedule hearings.

16 Mr. Rubin, would you please check with your
17 witness on his availability for hearings during the
18 period of June 14th through June 25th and report back
19 to me within seven days? Depending on what days are
20 convenient for the witness, tentative hearings will be
21 scheduled, and everyone will be expected to save the
22 appropriate dates in case a hearing proves to be
23 necessary.

24 To the extent that participants may wish to
25 submit testimony in opposition to this request, they

1 should expect that testimony to be due on July 1,
2 2004. Does any participant have any additional issues
3 related to the request to this proceeding under the
4 rules for experimental cases?

5 (No response.)

6 CHAIRMAN OMAS: The Postal Service also
7 requested waivers, if necessary, of certain filing
8 requirements in Rule 64. I believe this motion is
9 unopposed. Does any participant wish to comment on
10 that motion at this time?

11 (No response.)

12 CHAIRMAN OMAS: If not, are there any other
13 matters that participants wish to raise at this time?

14 (No response.)

15 CHAIRMAN OMAS: If not, I would like to
16 thank you for your patience this morning, and I have
17 nothing further, and this prehearing conference is
18 adjourned. Thank you.

19 (Whereupon, at 10:37 a.m., the prehearing
20 conference was adjourned.)

21 //

22 //

23 //

24 //

25 //

1 REPORTER'S CERTIFICATE

2

3 DOCKET NO. MC2004-1

4 CASE TITLE: Experimental Periodicals

5 Co-Palletization Dropship Discounts for High Editorial

6 Publications 2004

7 HEARING DATE: March 25, 2004

8 LOCATION: Washington, D.C.

9

10 I hereby certify that the proceedings and

11 evidence are contained fully and accurately on the

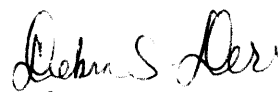
12 tapes and notes reported by me at the hearing in the

13 above case before the Postal Rate Commission.

14

15

16 Date: March 25, 2004

17 
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